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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1359 118

JAMES PICARELLI,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BARCLAY 7—3648-9 :52

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

JAMES PICARELLI, by his attorney, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on the 12th day of May, 1945.

Opinion Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit (SWAN, A. N. HAND and CLARK, Circuit Judges) is annexed to the original certified transcript of record.

Jurisdiction

The order for mandate of the United States Circuit Court for the Second Circuit was entered on May 12, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also rules XI and XIII of the Rules of Practice and Procedure after Plea of Guilty, Verdict or Finding of Guilt in criminal cases, promulgated by this Court May 7, 1934.

Questions Presented

1. Did the Circuit Court err in refusing to reverse the judgment of conviction herein.

2. Did the Trial Judge err in denying petitioner's motion to dismiss the information at the end of the Government's case.

3. Did the Trial Judge err in denying petitioner's motion to dismiss the information at the end of the entire case.

The Statute and Regulations Involved

The statute involved is Title 50, Appendix, Section 633, United States Code, which vests in the President the power to regulate materials essential for national defense. Pursuant to an Executive Order, the authority pertaining to the rationing of gasoline was delegated to the Office of Price Administration and Ration Order No. 5A was duly promulgated by the Price Administrator.

The Information

The Information contains one count which charges that James Picarelli and Thomas J. Ward, the defendants

herein, unlawfully, wilfully and knowingly did have in their possession approximately 8,271 A-9, A-10, A-11, and A-12 gasoline ration coupons, the said defendants being then and there not the person or agent of the person to whom said coupons were issued, or by whom they were acquired in accordance with Ration Order No. 5A duly issued by the Price Administration * * *.

The Facts

The defendants, Ward and Picarelli, were by their own statements, bookmakers. They were not the person or persons or the agent or agents of the person or persons entitled to possession of the gasoline coupons at issue on the trial. Defendants stipulated this fact (fols. 26 to 32). On the 9th day of November, 1943, they were in a car in the vicinity of 20 Cherry Street, in the City and County of New York, where they were observed by John F. Trihy, a member of the New York City Police Department (fols. 34, 35). Picarelli was seen to leave the car, go to an empty lot, pick up some empty whiskey bottles and return with them to the car. Ward was observed sitting in the back, looking at some papers. Trihy entered the car and asked Ward what his occupation was. Ward stated that he was a bookmaker. Trihy then took a paper bag and cards from Ward's lap (fol. 35), looked in the bag and discovered therein a quantity of "A" gasoline ration coupons. Trihy examined the cards and found them to be small index type cards containing names and addresses and in many instances a crayoned notation reading "A." Trihy then ordered Picarelli to drive to the Third Precinct Station House on Oak Street (fol. 62). While the car was en route to the station house, Picarelli stopped the car and said, "Listen Officer, can't we talk this thing over" (fol. 63).

At the station house Trihy was joined by Andrew F. Kaye, a Special Investigator of the OPA, who questioned the defendants. Ward admitted having the bag in his lap (fol. 132) but disclaimed ownership thereof (fol. 133) and disclaimed knowledge of the contents (fol. 155).

Picarelli denied possessing the stamps (fol. 122). Agent Kaye testified that Picarelli told him that the car had been repurchased by him a day or two before from one, Frank Greco (fol. 120). Agent Kaye called Greco to the station house. Greco, in the presence of Picarelli, said that he had left no stamps in the car and that he did not have any stamps (fols. 120, 122).

Defendant Ward testified at the trial that he never had the bag in his lap, but that he had noticed it hidden between the cushions in the rear of the car and did not know what it contained. In this respect his testimony was in conflict with that of Officer Trihy who said Ward had the bag in his lap, and also conflicted with Ward's admission to Agent Kaye that he had the bag in his lap (fols. 132, 134). Ward further stated that he never before saw either the cards or the coupons and that he had only touched the cards and never touched the coupons.

No evidence of bookmaking or its necessary paraphernalia was found on the defendants (fol. 228).

Picarelli did not take the stand or offer any witnesses (fol. 222).

Specification of Errors to Be Urged

The Court below erred as follows:

1. In sustaining the judgment of conviction.

2. In failing to reverse the judgment of conviction for failure of the District Court to grant the motion for directed verdict on grounds of insufficient evidence.

3. In failing to reverse the judgment of the District Court for its error in overruling petitioner's motion in arrest of judgment.

Reasons for Granting the Writ

1. Did the Circuit Court err in refusing to reverse the judgment of conviction herein?

2. Did the Trial Judge err in denying petitioner's motion to dismiss the information at the end of the Government's case?

3. Did the Trial Judge err in denying petitioner's motion to dismiss the information at the end of the entire case?

A

It is a fundamental proposition of law that on a motion for a directed verdict, the evidence must be considered in its most favorable aspect to the appellee.

United States v. *Scarborough* (C. C. A.), 57 F. (2d) 137;
Knable v. *United States* (C. C. A.), 9 F. (2d) 567;
Burton v. *United States*, 202 U. S. 344;
Kelly v. *United States* (C. C. A.), 258 F. 392.

If there is substantial evidence, it must be submitted to the jury, whose function it is to consider and weigh it, and this includes credibility of witnesses.

Montana Tonopah Mining Co. v. *Dunlap* (C. C. A.), 196 F. 612;
United States v. *Burke* (C. C. A.), 50 F. (2d) 653;
United States v. *Lesher* (C. C. A.), 59 F. (2d) 53;

Toledo, St. L. & W. R. Co. v. *Howe* (C. C. A.), 191 F. 776;
Woodward v. *Atlantic Coast Line R. R.* (C. C. A.), 57 F. (2d) 1019;
Engstrom v. *De Witt* (C. C. A.), 58 F. (2d) 137.

The record in the instant case clearly shows that there is no substantial evidence to sustain the charge against the petitioner, Picarelli, to wit: that he did unlawfully, wilfully and knowingly have in his possession gasoline ration coupons in violation of ration order 5A, duly issued by the Price Administrator. (Italics mine.)

The following colloquy occurred as to the admission of the cards as an exhibit:

> "Mr. McLaughlin: If your Honor please, I think at this time this batch of cards has been sufficiently identified.
>
> The Court: Any objection to the particular ones identified by the witness?
>
> Mr. Solomon: The defendant Picarelli objects to the introduction of the cards in evidence so far as he is concerned, on the ground that the testimony shows that they were found in the possession of the co-defendant Ward, and have no connection with my client, and there is no evidence to show that he had any knowledge or possession or knew of the existence of these cards. I ask your Honor to exclude them insofar as they are related to the defendant Picarelli.
>
> The Court: I think at this time the Court would agree with you. There isn't any connection with the defendant Picarelli through this witness. At this particular time the motion to admit the cards will be sustained and the jury will be instructed to disregard the cards so far as the defendant Picarelli is concerned" (fols. 47-48).

The following colloquy occurred as to the admission of the brown paper bag and its contents, which are strips of stamps:

"Mr. McLaughlin: If your Honor please, at this time I offer this brown paper bag and its contents, which are strips of stamps.

The Court: Any objection?

Mr. Solomon: I object to the introduction—

The Court: The same objection will be sustained. It is not binding on your defendant at this time. It may be reoffered later but at this time it is not admissible against the defendant Picarelli.

Mr. Broderick: No objection on behalf of the defendant Ward.

The Court: It may be admitted.

(Marked Government's Exhibit 2)" (fol. 60).

The following colloquy occurred as to the admission of other cards found in the possession of the defendant Ward:

"Mr. McLaughlin: I now offer these in evidence, your Honor.

The Court: Any objection?

Mr. Solomon: So far as the defendant Picarelli is concerned, I raise the same objection. Are these different cards?

Mr. McLaughlin: No, the same cards. It is a portion of them.

The Court: A portion was admitted this morning.

Mr. Solomon: I object to them as to my client on the same grounds as to the others. There is no proof that my client had them in his possession or under his control.

The Court: Are you offering them against one defendant or both?

Mr. McLaughlin: I am offering them as I offered them originally, as against Ward. I don't wish to be bound—

The Court: Any objection on the part of Ward?

Mr. Broderick: No.

The Court: They may be admitted as against Ward. They are only offered for that purpose.

Mr. McLaughlin: I am offering them for the purposes of the entire case but I understand your Honor will only take them at this time as to Ward and subject to connection as to Picarelli.

The Court: I refused them this morning as to Picarelli.

Mr. McLaughlin: That is right. No further questions.

(Marked Government's Exhibit 3)" (fols. 147-148).

In *Union Pacific Coal Co.* v. *U. S.*, 173 F. at page 740, Circuit Judge SANBORN, speaking for the Court, said:

> "There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a judgment of conviction. Vernon v. United States, 146 Fed. 121, 123, 124; United States v. Richards (D. C.), 149 Fed. 443, 454; Hayes v. United States (C. C. A.), 169 Fed. 101, 103; United States v. Hart (D. C.), 78 Fed. 868, 873, affirmed in Hart v. United States, 84 Fed. 799."

To the same effect, see:

Hart v. *U. S.*, 84 Fed. 799-808;
Wright v. *U. S.*, 227 Fed. 857;
Wiener v. *U. S.*, 282 Fed. 799-801;
Yusem v. *U. S.*, 8 Fed. Report (2), page 8.

In said case, the Court held as follows:

> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate

court to reverse a judgment of conviction. Hart v. United States, 84 F. 799-808; Union Pacific Coal Co. v. United States, 173 F. 737, 740; Wright v. United States, 227 F. 855, 857; Joseph Wiener et al. v. United States (C. C. A.), 282 F. 799-801. The evidence was not sufficient to sustain the verdict, and the jury should have been instructed to return a verdict for the defendant on the motion of his counsel at the conclusion of the government's case."

The evidence here shows affirmatively that the stamps were never in the possession of the petitioner, Picarelli; or that he knew of their being in the possession of the co-defendant, Ward. They were excluded as exhibits as to the petitioner, Picarelli.

The Court excluded Government's Exhibits 1, 2 and 3 when they were offered against the petitioner, Picarelli, because there wasn't any connection with him.

It is, therefore, clear from the rulings of the Court that there was no evidence to connect the charge set forth in the information with the petitioner, Picarelli; therefore, the Government lacked any proof of an unlawful, wilful and knowing possession by the petitioner, Picarelli, of the gasoline ration stamps referred to in the information. This being so, there was a failure of any proof connecting the petitioner, Picarelli, with the offense charged. *There was no substantial evidence against the petitioner, Picarelli. For the lack of such substantial evidence there was nothing for the jury to weigh. Therefore, the case should not have been sent to the jury, and the motion for a directed verdict as to the petitioner, Picarelli, should have been granted.*

B

The Court in a *Per Curiam* opinion held as follows:

"• • • As to Picarelli the case was somewhat less strong but was still sufficient to submit to the jury. Picarelli owned the parked automobile. The

> officers saw him leave the driver's seat, walk to a vacant lot, pick up some empty bottles and bring them back to the car. At this moment the policemen intervened. Picarelli stated to the arresting officer that he did not know where the coupons came from and that Ward said he found them in the car. On the way to the police station, Picarelli pulled his car to the curb and said to the policeman: 'Listen, officer, can't we talk this thing over?' No innocent explanation of this inquiry being vouchsafed, we think the effort to effect a settlement may be regarded as evidencing consciousness of guilt. Christian v. U. S., 8 F. 2d, 732, 733 (C. C. A. 3); 4 Wigmore, evidence, 3rd ed., p. 31. This, coupled with ownership of the car, justified sending the case to the jury * * *."

Apparently, the Circuit Court of Appeals affirmed the conviction on the above statement of consciousness of guilt. The evidence adduced at the trial dealt exclusively with statements made by the defendant or his co-defendant that they were engaged in bookmaking. Therefore, the Circuit Court should have inferred that the petitioner, Picarelli, when talking to the police officer, was under the impression that an arrest was being made for violation of a bookmaking statute and the theory of consciousness of guilt should have applied only to the discussion of bookmaking and not to the charge for which the petitioner was placed on trial.

CONCLUSION

The questions submitted, coupled with the acknowledgment of the Circuit Court that the case was somewhat less strong as against the petitioner, is in the opinion of your deponent sufficient for this Court to grant the petition for a writ of certiorari. The writ should be granted.

Respectfully submitted,

ABRAHAM SOLOMON,
Counsel for Petitioner.

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CITATIONS

659029—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 118

JAMES PICARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. 129–130) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 12, 1945 (R. 131). The petition for a writ of certiorari was filed June 8, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The sole question presented is whether the evidence is sufficient to sustain petitioner's conviction.

STATUTE AND REGULATION INVOLVED

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. IV, 633, provides in part:

> (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * *
>
> (5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.
>
> * * * * *

> (8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

Ration Order No. 5A (7 F. R. 5225, as amended, 7 F. R. 7399), issued by the Office of Price Administration pursuant to the authority of Section 2 (a) (2) and (8) of the Act of June 28, 1940, as amended (*supra*), provided in pertinent part as of the date of the offense involved here:

> § 1394.1102 (c). No person shall have in his possession any gasoline coupon book or bulk, inventory or other coupon (whether or not such book was issued as a ration book and whether or not such coupon was issued as a ration or as part of a ration book), or exchange certificate, except the person or the agent of the person, to whom such book, coupon or certificate was issued, or by whom it was acquired, in accordance with the provisions of Ration Order No. 5A.

STATEMENT

On May 5, 1944, petitioner and Thomas J. Ward were charged in a one-count information filed in the District Court for the Southern District of New York with unlawfully having in their possession certain gasoline ration coupons, in violation of Ration Order No. 5A and the Second War Powers Act (R. 2, 4). After a jury trial, they

were each convicted (R. 92) and sentenced to imprisonment for nine months and fined $500 (R. 108, 111, 112). Upon appeal to the Circuit Court of Appeals for the Second Circuit, the convictions were affirmed (R. 129–130, 131).

The evidence adduced at the trial may be summarized as follows:

On November 9, 1943, Trihy and McElhone, two officers of the New York City Police Department, observed an automobile parked in the street near a vacant lot. The officers saw petitioner leave the car, walk to the lot, pick up some empty bottles, and return with them as far as the door of the car. At this point, and while petitioner was standing on the sidewalk, officer Trihy looked into the car and saw Ward on the back seat examining some small cards bearing names and addresses and, in many instances, the notation "A" written in crayon. (R. 12, 13, 15.) Trihy entered the car and asked Ward what his occupation was, to which Ward replied that he was a "bookmaker." Trihy testified that he thereupon took a paper bag from Ward's lap and, upon examination, found that it contained 8271 "A" gasoline ration coupons. (R. 12.) Trihy then directed petitioner to get in the car and drive to the station house. While en route, petitioner said to Trihy, "Listen, Officer, can't we talk this thing over?" Trihy replied, "No talking over. This is a Government offense. Drive to the station house." (R. 21.)

At the station house, petitioner and Ward were questioned by one Kaye, an investigator from the Office of Price Administration (R. 21). Kaye testified that Ward told him that the bag was in his lap when Trihy entered the car (R. 44). Kaye further testified that petitioner informed him that he was a bookmaker (R. 41), that he had owned the car prior to March 1943, at which time he sold it to one Greco, and that Greco had resold it to him a day or two before the arrest (R. 40). Greco was then summoned to the station house and questioned. Kaye testified, without objection, that Greco denied having left any ration coupons in the car (R. 40–41). Trihy testified that he heard petitioner tell Kaye that Ward said he had found the coupons in the car (R. 23).

When called in rebuttal, Trihy testified that at the station house he searched Ward while McElhone searched petitioner, and that he and Kaye searched the car outside the station house, but that they found no evidence of bookmaking. Trihy further testified that from the time of the arrest until the completion of the search, he and McElhone kept petitioner and Ward under constant surveillance and that neither had been observed to hide or destroy any racing slips or other betting paraphernalia. (R. 76, 77, 78, 79, 80.)

It was stipulated that neither Ward nor petitioner was entitled to possession of the coupons (R. 9–11), which were proved to be genuine (R.

47). Both the coupons and the cards taken from Ward at the time of the arrest were admitted in evidence as against him, but not as against petitioner (R. 16, 20, 49, 50, 83).

Petitioner did not take the stand or offer any witnesses in his defense (R. 74).

Ward testified that just before the arrest he had met petitioner in the latter's car at a nearby street corner, and that petitioner then drove him to the place where the arrest was made (R. 68). Ward maintained that the bag was not on his lap as testified by Trihy and as Ward, according to Kaye's testimony, had admitted immediately after the arrest (see pp. 4, 5, *supra*) Ward declared that when he got into the car after meeting petitioner he noticed that the bag was stuck between the end of the seat and the side of the car, and that it was from that place that Trihy took the bag. (R. 69.)

The court charged the jury, *inter alia,* as to the presumption of innocence, the right of a defendant not to testify, the burden on the Government to establish its case beyond a reasonable doubt, and the meaning of reasonable doubt (R. 85–89). Petitioner did not except to the charge, but requested the additional charge that even though the ration coupons were discovered in his car he could not be found guilty of unlawful possession unless he had guilty knowledge of their presence. This request was granted (R. 90).

ARGUMENT

Petitioner contends (Pet. 4–10) that the trial court committed reversible error in denying his motions for a directed verdict made at the close of the Government's case and again at the end of the entire case, because there was no evidence from which the jury could find beyond a reasonable doubt that he knowingly and unlawfully had the ration coupons in his possession. He argues (Pet. 9) that since the trial court refused to admit the coupons themselves in evidence against him, there was no basis for permitting the case as against him to go to the jury. We submit that, viewing the evidence and the inferences to be drawn therefrom in the light most favorable to the Government (*Glasser* v. *United States,* 315 U. S. 60, 80), the contention and argument are untenable.

The uncontroverted evidence shows that this large quantity of ration coupons, to the possession of which neither petitioner nor Ward was entitled, was found in the immediate possession of petitioner's companion and codefendant Ward, who at the time was sitting in an automobile belonging to petitioner, apparently waiting for the latter to return to the car from the vacant lot near which they had parked, and that after being arrested petitioner said to the officer, "Listen, Officer, can't we talk this thing over?" (See p. 4, *supra.*)

Although he did not take the stand at the trial, petitioner now suggests (Pet. 10) that the inquiry

he made of the officer should be construed as having been prompted by the idea that he had been apprehended for bookmaking, and not because he had any consciousness of guilty possession of ration coupons. However, it is to be noted that he made no comment and asked for no explanation when the officer replied, "No talking over. This is a Government offense," which in common parlance and in the context in which it was uttered obviously meant a Federal offense. A more likely inference is that petitioner's silence after being told that he was involved in a "Government" offense indicated that he understood the illegal possession of gasoline coupons was meant. Since no innocent explanation of the episode was made to appear by evidence, we submit that petitioner's attempt to effect a settlement might be regarded by the jury as evidencing consciousness of guilt of the offense charged. *Christian* v. *United States,* 8 F. 2d 732, 733 (C. C. A. 5) and cases cited; 4 Wigmore, *Evidence,* 3d ed., p. 31.

The jury also may have believed the testimony of Ward in so far as he stated that shortly before his apprehension he had observed the bag containing the coupons stuck between the seat and the side of the car, while disbelieving that part of it in which he said that he did not have the bag on his lap. This, coupled with petitioner's admission that he owned the car and his statement that Ward told him that he had found the coupons in

the car, together with the suspicious character of the suggestion that the arresting officer talk things over with petitioner, justified sending the case to the jury.

Petitioner's further contention (Pet. 8–9), in effect, that on the basis of applicable principles relative to conviction upon circumstantial evidence the facts in this case cannot support a verdict of guilty, is without substance. The rule as to circumstantial evidence is that where guilt depends upon such evidence, the evidence, considered *in toto,* must be inconsistent with the theory of innocence, or, as stated in the citations to which petitioner refers, exclude every reasonable hypothesis except guilt. This means, we believe, no more than that a jury should not be allowed to speculate as to a defendant's guilt in a case where the circumstantial evidence, considered as a whole, does not clearly point toward guilt. The rule does not require the exclusion of every hypothesis or possibility of innocence, but only any fair and rational hypothesis except that of guilt. Nothing in the rule prevents the jury from finding guilt entirely upon circumstantial evidence; and the requirement of proof beyond a reasonable doubt operates on the whole case and not upon separate bits of evidence. *United States* v. *Pape,* 144 F. 2d 778, 781 (C. C. A. 2), certiorari denied, 323 U. S. 752; *United States* v. *Feinberg,* 140 F. 2d 592, 594 (C. C. A. 2), certiorari denied, 322 U. S. 726;

United States v. *Valenti,* 134 F. 2d 362, 364–365 (C. C. A. 2), certiorari denied, 319 U. S. 761. Tested by these principles, the evidence here justifies the jury's verdict as to petitioner, and no sufficient reason appears why the concurrence of the district judge, the jury, and the Circuit Court of Appeals as to the sufficiency of the evidence should not be accepted as final. *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589–590.

CONCLUSION

The decision below is correct, the case does not present any question of general importance, and there is no conflict with decisions of other circuit courts of appeal or of this Court. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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JULY 1945.

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